

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0872, Springhaven Campground, LLC v. Howard E. Pennock, Individually and as Trustee of the Howard E. Pennock Revocable Trust and Judith Pennock, Individually and as Trustee of the Judith Pennock Revocable Trust, the court on February 16, 2006, issued the following order:

The respondents, Howard Pennock, individually and as trustee of the Howard Pennock Revocable Trust, and Judith Pennock, individually and as trustee of the Judith Pennock Revocable Trust, appeal an order of the trial court finding that the petitioner, Springhaven Campground, obtained an easement by prescription. We affirm.

To establish a prescriptive easement, the petitioner must prove by the balance of the probabilities that it used the respondents' land for twenty years and that its use was adverse, continuous and uninterrupted in such a manner as to give the respondents notice that an adverse claim was being made. Bonardi v. Kazmirchuk, 146 N.H. 640, 642 (2001). The nature of the use must have been such as to show that "the owner knew or ought to have known that the right was being exercised, not in reliance upon the owner's toleration or permission, but without regard to the owner's consent." *Id.* (quotations omitted). Whether use of the property is adverse is an issue of fact; we will not reverse the trial court's findings and rulings unless they are unsupported by the evidence or erroneous as a matter of law. *Id.* at 643.

In this case, the trial court found and the parties do not contest that the petitioner did "not own, in fee simple, direct access to, or property on Lake Winnepesaukee." The trial court also found that the petitioner's predecessor used the contested property in a continuous and uninterrupted manner from 1947 until at least 1974. The respondents argue that the trial court erred in failing to find that the use of the beach by the petitioner's predecessors was permissive and in finding that the use was continuous and uninterrupted. The evidence included that the petitioner's predecessors marked off a swimming area for children, held community beach clean-up days, installed a dry hydrant, walked down Chestnut Street to the beach whenever they wished, and that Chestnut Street was public until the respondents bought it. Based upon the record before us, we cannot conclude that the trial court's finding that the use was adverse was error. *See id.* at 642; Bogardus v. Zinkevics, 134 N.H. 527, 531 (1991) (function of appellate review is to determine whether on basis of evidence reasonable person could have reached same decision as trial court).

Nor are we persuaded by the respondents' argument that the use by the petitioner's predecessors was not continuous. Testimony in the record supports a finding that people from the campground used the beach continuously from 1947 to 1974. Although the respondents cite the lack of testimony by former campers of their continuous use during this period, the absence of such testimony is not fatal to the petitioner's claim in light of the testimony of others who observed the campers' use during this time.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**